This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 5/18/01.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF	)	
	)	
Michael Lamar Cox,	)	
Complainant	)	
	)	**CHARGE NO.: 1998 CF 0191**
and	)	**EEOC NO.: 21B973254**
	)	**ALS NO.: 10739**
The Home Depot,	)	
Respondents	)	

RECOMMENDED ORDER AND DECISION

This matter is before me on cross-motions for summary decision. Respondent's Motion For Summary Decision ("Motion I") was filed on July 31, 2000; Complainant filed a response to Motion I on August 24, 2000 and Respondent filed a reply on September 21, 2000. Complainant's Motion for Summary Decision Against Defendant ("Motion II") was also filed on July 31, 2000 and Respondent filed a response to Motion II on September 7, 2000. Oral argument was heard from both parties on October 2, 2000. After due consideration of the briefs and arguments, I find that with regard to Respondent's Motion I, there is no issue of material fact to be determined at a public hearing and that the motion should be granted. Complainant's Motion II is denied.

Statement of the Case

The Department of Human Rights ("Department") filed the complaint in this case on behalf of Complainant on February 8, 1999. Respondent filed its unverified answer on March 26, 1999, and a verification of the answer was filed on April 21, 1999 pursuant to leave granted by an administrative law judge. During this time, Complainant was represented by

counsel and he filed an answer to the affirmative defenses raised in Respondent's answer on April 6, 1999. Complainant's counsel moved to withdraw from the representation on September 9, 1999 and the motion was granted on September 20, 1999. To date, Complainant has not obtained new counsel and has represented himself *pro se*. After a contentious period of discovery, the parties filed the motions that are the subject of this recommended order.

Findings of Fact

1. Respondent was properly served with notice of this matter and answered the complaint in a timely manner. It has been represented by counsel throughout these proceedings.

2. Complainant's counsel withdrew when the discovery process was in its earliest stage. Complainant entered his personal appearance *pro se* on January 10, 2000.

3. Complainant was employed by Respondent for two distinct periods of time; this complaint arises from the second period of employment, October 7, 1996 to June 19, 1997.

4. During both periods of employment with Respondent, Complainant received a salary of $6.00 per hour. Complainant had no experience in the hardware or home improvement industries prior to his employment with Respondent.

5. Respondent provides a salary to new employees that is commensurate with their past experience relevant to the position for which the person is hired.

6. Respondent does not pay a premium salary, differential or bonus to employees who work night shift hours.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. There is no allegation or evidence of any direct discriminatory behavior of Respondent toward Complainant.

4. Under the process outlined by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Complainant has established a *prima facie* case of employment discrimination based on the disparate salary he received compared to similarly situated employees of other races.

5. Respondent has advanced a reasonable explanation for the difference in the salary paid to Complainant and Complainant has not rebutted the inference of non-discriminatory behavior to be drawn from this.

6. In that Respondent does not pay any employee a premium salary, differential or bonus for working night hours, no discriminatory behavior, direct or indirect, can be attributed to Respondent for failure to pay Complainant any such premium salary, differential or bonus.

7. Because Complainant has failed to show through the pleadings and briefs filed in this case that Respondent took any discriminatory action against him, whether direct or indirect, and that are no issues of material fact remaining for determination, Respondent is entitled to the dismissal of the complaint with prejudice.

Discussion

Under Section 8-106.1 of the Illinois Human Rights Act, either party to a complaint before the Commission may move for summary decision and, it shall be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a recommended

order as a matter of law." The standards used in evaluation motions for summary decision are the same as those employed in the courts of Illinois in determining motions for summary judgment, a principle that was affirmed by the Illinois Appellate Court in Fitzpatrick v. Illinois Human Rights Commission, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994) and Cano v. Village of Dolton, 250 Ill.App.3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 883 (1st Dist. 1993).

In considering a motion for summary decision, as with a motion for summary judgment, reasonable inferences may be drawn from undisputed facts, but must be drawn in favor of the non-moving party where the facts are susceptible to two or more interpretations. Purdy Company of Illinois v. Transportation Insurance Company, Inc., 209 Ill.App.3d 519, 568 N.E.2d 318, 154 Ill.Dec. 318 (1st Dist. 1991). Such inferences cannot be unreasonable, speculative, or conjectural. The facts presented by the party opposed to the motion for summary decision do not have to be as conclusive as those presented at a hearing, they must provide a factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 608 N.E.2d 920, 181 Ill.Dec. 669 (4th Dist. 1993). If an analysis of the facts presented by the movant and the non-movant result in a conclusion that there are no issues of material fact remaining for proof at a hearing, the movant is entitled to dismissal of the complaint with prejudice.

In Complainant's Motion II, he does not present any new facts or additional facts that would tend to establish his claim, but instead he only cites to the complaint itself: "c) the rights of Michael L. Cox were violated by the Defendant in all instances specified in the Complaint according to Section 2-102A." As discussed in more detail below, the allegations made by Complainant do not support a conclusion in his favor that there are no material facts to be established to determine that the Respondent engaged in the discriminatory behavior as alleged.

To the contrary, an examination of the facts now in the record instead establish that Respondent is entitled to summary decision. Motion II must be denied.

The complaint sets forth two distinct allegations of misconduct against Respondent. First, it is alleged that Respondent set Complainant's salary when he began his employment at the rate of $6.00 per hour in a discriminatory fashion in that similarly situated employees of other races received a higher initial salary. And, secondly, Complainant alleges that when he was assigned to the night shift by Respondent, he did not receive a premium salary, differential or bonus as was allegedly received by other night crew members. Respondent has advanced additional competent facts beyond the simple denials found in its answer which have gone unrebutted by Complainant to establish that both of these allegations are unfounded and that there remain no issues of material fact to be determined.

Complainant's employment application submitted to Respondent indicates that Complainant had no prior experience in the hardware or home improvement industries when he was first employed by Respondent and he only briefly did some house painting between his first and second stints of employment. As with at least two white new employees cited by Respondent, Complainant's salary was set at $6.00 per hour. Respondent's stated policy is to provide a starting salary commensurate with the relevant experience a new employee brings to the job site. This is a reasonable and non-discriminatory basis upon which such determinations can be made. No discriminatory behavior can be inferred from the setting of Complainant's salary rate because he had no relevant experience and it is not shown that other employees with no relevant experience received a higher wage.

When Complainant was assigned to the night crew, other members were receiving higher salary rates than he was receiving. However, Respondent has shown both that it does not pay a

premium to employees assigned to the night shift and that the employees working nights with Complainant all had significant experience in the hardware and home improvement industries before they commenced their employment at Respondent; accordingly, they were given higher starting salaries. The records provided show that none of the employees on the night crew received a change in salary when they transferred to nights from day shift assignments. There is no evidence that Respondent pays a night incentive to any employee or that Complainant was disadvantaged compared to other night crew employees by not receiving such a benefit.

Because there is no remaining issue of material fact remaining regarding these allegations, Respondent is entitled by law to a finding that this complaint should be dismissed with prejudice.

It should be noted that the complaint filed by the Department indicated that with regard to both counts, Respondent "failed to provide applications and wage statements for similarly situated employees at Complainant's work location." Complaint, Paragraphs Nine and Nineteen. The failure to provide this important relevant information, which is presumably the same information that was eventually furnished in conjunction with Motion I, likely contributed to the finding by the Department that Respondent's conduct toward Complainant was pretextual and discriminatory. Respondent may wish to reconsider whatever policy or strategic reasons led to the withholding of this information as doing so may have significantly prolonged this matter.

Recommendation

It is recommended that this case be dismissed with prejudice pursuant to the authority granted to the Commission in its procedural rules, Section 5300.735(b).

HUMAN RIGHTS COMMISSION

ENTERED: January 5, 2001

BY: _____

DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION